U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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SEP 16 2009

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision based upon the entire record of proceedings, to include the brief and additional evidence submitted in support of the appeal.

The petitioner is an information systems development and consulting company. It seeks to employ the beneficiary permanently in the United States as a computer software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a copy of Form ETA 750, Application for Alien Employment Certification, which was certified by the Department of Labor.[1]

The director stated that a request for additional evidence had been sent to the petitioner on February 21, 2008 and that, as of the date of the decision, the Service had not received a response to the request. The director rendered his decision based on the record as it stood and determined that the record did not establish that the petitioner had the ability to pay the proffered wage, that the beneficiary met the requirements listed on the labor certification, that the petitioner had withdrawn a previously approved petition which was based on the same labor certification, or that the petitioner had submitted Part B of the Form ETA 750 signed by the beneficiary. The director denied the petition accordingly.

On appeal, counsel contends that he never received the request for evidence. In support of the appeal, counsel has submitted a brief, as well as documents to address the deficiencies noted in the director's decision. Specifically, counsel has submitted copies of the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2003 through 2006; copies of the beneficiary's academic degrees and transcripts; an evaluation of the beneficiary's academic degrees;

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[1] This case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

a written statement signed by the petitioner's chief executive officer withdrawing the previously filed I-140 petition; and Part B of the Form ETA 750 signed by the beneficiary.

The director's decision will be withdrawn, and the matter will be remanded for entry of a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. The director should base his decision upon consideration of the entire record of proceedings, including all of the documents submitted in support of the instant appeal. If adverse to the petitioner, the decision is to be certified to the AAO for review. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's October 3, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.